

AMENDMENT AND RESPONSE

Serial Number: 09/659,502

Filing Date: September 11, 2000

Title: AROMATHERAPEUTIC ENVIRONMENTAL SYSTEM

Page 9

Dkt: 497.001US1

REMARKS CONCERNING THE AMENDMENTS

The above amendments have been made in an effort to more clearly define the invention and to respond to issues in the rejections.

Antecedent basis for the amendments may be found generally in the specification and, for example, page 22, lines 23-28 for wood finishing. New claims 29-30 find similar antecedent basis and also original claims 22-25 for kits with different materials applied to different surfaces.

RESPONSE TO THE REJECTIONS

Rejections Under 35 U.S.C. 112, Second Paragraph

All issues under 35 U.S.C. 112, second paragraph have been overcome by the above amendment, arguments or comments. Although many of the issues (such as "removal of foreign matter") are disagreed with, Applicants have voluntarily removed or amended the language objected to, removing the issues.

The sole issue not addressed by amendment is the issue regarding the assertion that Claims 1 and 27 contain conflicting limitations of "comprising" and "consisting of." The terms are not in conflict, and the basis of the non-conflict can be seen by appropriate parsing of the claims. The first important grammatical appreciation to be made is the fact that "consisting of" and "consisting essentially of" appear in two different locations. The first appearance of "consisting of" is merely the introduction to the Markush Group, and it is not believed that is the source of error. The second appearance of the term "consisting essentially of" is in the more traditional legal sense, limiting the content of the solvents in the system to only water and alcohol, excluding any other solvent that provides any substantial functional effect. That is, no solvent that causes or contributes to blooming, no cosolvent for other ingredients, or the like can be present. Other materials, such as fragrances, UV absorbers, thickening agents, and the like, are not excluded from the composition, but any other solvent for the oils is excluded. This is not a contradiction in the use of the comprising language for the liquid composition. Other materials may be present, except for solvents for the oil. This language is clear and readily understandable by one skilled in the art.

By making these arguments on the record, Applicant has made an estoppel against any other interpretation of the language, so these arguments also define the term in this manner and prevent the PTO from asserting that some other conflicting interpretation can be made. The claims allow for any liquid composition (meeting the substantive required component content) to be used as long as there are no more than two solvents in the system for the oil, and where those solvents may be only water or an alcohol. Any other solvent that makes any substantive functional contribution is excluded by these claims.

Similarly for the recitation of “applying...consisting of a liquid composition,” even with comprising recited elsewhere in the claim, the claim requires that the composition applied to the surface be only liquids. Suspended or dispersed solids cannot be present. Dissolved solids may be present, as they are no longer solids, but part of a liquid composition. This meaning is also clear to one skilled in the art. Ferguson requires a solid capsule to be present. This is excluded by this language both by this limitation and by the direct application recitation.

New claims 31 and 32 are even more limiting by reciting “consisting of” for the solvents of water and/or alcohol.

Rejections Under 35 U.S.C. 102(b) and 35 U.S.C. 102(e)

Claims 1-2, 4-21 and 26-28 have been rejected under 35 USC 102(e) as anticipated by Cheung et al. (6,177,388)

Claim 1 recites:

A method for providing aromatherapy to persons or animals within an ambient environment comprising applying a liquid composition to an inanimate surface to effect a household function selected from the group consisting of surface cleaning, surface shining, degreasing, cleansing, foreign matter removal, moisturizing, dish soaps, and ironing liquids, the liquid composition comprising an aromatherapeutic concentration of an aromatherapeutic essential oil of 0.1 to 20% by weight of the liquid composition, completing the household function, allowing the aromatherapeutic essential oil to remain within the ambient environment to effect aromatherapy on persons or animals within the ambient environment, solvents in said liquid composition consisting essentially of liquids selected from the group consisting of water and alcohols.

The Cheung reference specifically requires at least one solvent in addition to water or alcohol (if alcohol is one of the organic solvents used. Cheung specifically states:

“The concentrate compositions of the invention further comprise at least alkyl diphenyl solvent.” and

"The alkyl diphenyl solvent may be present in the concentrate compositions in amounts of from about 0.001% by weight to up to about 20% by weight, preferably about 0.01-10% by weight, most preferably in amount of between 0.1-8% by weight.

The inventors have found that with the presence of the alkyl diphenyl solvent in the present formulations, it is preferable to have present in the formulation the higher aliphatic primary or secondary alcohol mentioned herein. Such higher aliphatic primary or secondary alcohols aid in the dissolution of the alkyl diphenyl solvents in the concentrate compositions, ensuring that the clarity of the concentrate formulation is maintained, which is especially important from a consumer standpoint. When used, the higher aliphatic primary or secondary alcohols are present in the concentrate formulations in amounts of from about 0.001% wt. to about 5% wt., preferably from about 0.01% wt. to about 3% wt., and more preferably from about 0.1% wt. to about 2% wt. %."

As Cheung requires additional solvents beyond the possibility of water and alcohol, and the present claims exclude any solvent other than water and alcohol, Cheung does not anticipate the claims. Cheung requires the presence of this additional solvent to provide the properties of his composition. It is not anticipation to show a composition that is excluded by the claims.

Claim 21 has been rejected under 35 USC 102(a) as anticipated by Elliot (5,620,695)

Rejections Under 35 U.S.C. 103(a)

This rejection is moot with the cancellation of claim 21 as belonging to a claim group that should have been restricted out.

Claim 3 has been rejected under 35 USC 103(a) as unpatentable over Ferguson et al. in view of Durbat (6,022,839).

Ferguson et al. shows an encapsulated medium that is applied with active cleaning ingredients or other functional ingredients in a friable microcapsule. A liquid with the

microcapsules dispersed therein are applied to a surface, and the capsules must be broken to cause contact of the active ingredients with the surface. There is no direct application of the liquid composition to the surface. Direct mean exactly that – application of the material directly, without intermediate steps (such as rupturing of shells and using shells as an abrasive) to a surface. That recitation specifically excludes the practice of Ferguson et al. Applicants would have likewise been willing to accept language consistent with “non-encapsulated” (for which conception is shown in the specification and the examples, where no capsules are used), but would have used that term only upon pre-agreement by the Examiner that there is no issue of lack of antecedent basis under 35 USC 112, first or second paragraphs in the use of that language. The previous amendment of “directly” applying the liquid is, however, sufficient to exclude the compositions of Ferguson et al. This reference is not anticipatory of the subject matter of the claims.

The recitation of directly applying is a substantive limitation in the claim and cannot be ignored. The process of Ferguson clearly requires indirect application of active materials, and the composition of those active materials is defined by the needs of an encapsulation system. The encapsulation system of Ferguson is specifically required to separate the active ingredients from the carrier liquid.

Additionally, the incidental disclosure in Ferguson of materials that happen to be aromatherapeutic ingredients (e.g., the 0.1% fill composition of Chamomile extract in Table 7) shows the use of this component below the levels recited in the claims. Although the claims require 0.1% of the liquid composition directly applied to the surface, Ferguson shows such secondary ingredients (as part of the fill in the capsules) as 0.1% of the fill, which is then dispersed in a carrier. Therefore, even if the fill of Ferguson contained concentrations as recited in the claims, those concentrations are highly diluted upon indirect application requiring breakage of the capsules. (See column 9, line 14 through column 10, line 29. The bead comprises 0.5% of the total composition and the chamomile extract is 0.1% of that capsule, indicating a usage level of 0.005%, well below the minimum of 0.1% recited in the claims.

The range of “botanicals described by Ferguson is stated on column 4, lines 1-10 as 0.1-1% as the capsule fill composition (not the total composition of the composition). With the beads as a maximum amount of 2% of the composition (column 4, lines 11-15), the botanicals

would therefore constitute a maximum of 2.0% x 1% or 0.02%, well below the minimum recitation of 0.1% recited in the claims. Therefore, even if the disclosure of Ferguson is erroneously interpreted as "direct application," the concentration of applied materials would be outside the scope recited in the claims.

Additionally, the claims now emphasize that a composition consisting of a liquid composition is applied to surfaces. Therefore the claims clearly exclude the solid shells required by Ferguson. The claims cannot be obvious from the teachings of Ferguson et al. Both the concentration requirement and the liquid requirement of the composition is not shown by Ferguson.

Claim 3 has been rejected under 35 USC 103(a) as unpatentable over Ferguson (as above) when further considered by Durbat

Durbat is cited to show the specific type of surfaces cleaned. Durbat does not correct the deficiencies noted for Ferguson et al. As those deficiencies noted above have not been corrected, the rejection is in error and must be withdrawn.

The Patentability of the new claims

New claims 29, 30 and 32 specifically require that two different compositions with the same aromatherapeutic oil be used in the same room environment, and that the composition are different. This concept is not shown by any of the references, alone or in combination.

New claim 31 recites that the solvent "consist of" water and alcohol. This term further excludes the compositions of Cheung.

AMENDMENT AND RESPONSE

Serial Number: 09/659,502

Filing Date: September 11, 2000

Title: AROMATHERAPEUTIC ENVIRONMENTAL SYSTEM

Page 15

Dkt: 497.001US1

CONCLUSION

For the above reasons, the rejections of record are in error and should be withdrawn. Applicants would appreciate a telephone call from the examiner if any personal conference would be useful in addressing any remaining issues in this Application. The Examiner is invited to telephone Applicant's attorney at (952)832.9090 to facilitate prosecution of this application.

Respectfully submitted,

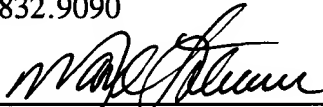
Monica Nassif et al.

By their Representatives,

MARK A. LITMAN & ASSOCIATES P.A.
YORK BUSINESS CENTER, SUITE 205
3209 West 76th Street
Edina, MN 55435
(952)832.9090

Date 17 November 2003

By



Mark A. Litman

Reg. No. 26,390

I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to MAIL STOP: AMENDMENT P.O. BOX 1450, Commissioner of Patents, Alexandria, VA 22313-1450 on 17 November 2003.

Name

Signature

